Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00201-CR

Michael Irvin **TUCKER**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CR5978
Honorable Mark R. Luitjen, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Luz Elena D. Chapa, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 17, 2020

AFFIRMED

A jury found appellant Michael Irvin Tucker guilty of bodily injury to a disabled individual. Tucker appeals his conviction, arguing he was denied his right to counsel and to indictment by a legally constituted grand jury. We affirm the trial court's judgment.

BACKGROUND

On November 29, 2017, Bexar County Sheriff's officers arrested Tucker after responding to reports that he had hit or punched his ex-wife's adult son, Jalen Lenzy. At that time, Lenzy was

recovering from a previous injury that impaired his ability to walk. On June 12, 2018, a Bexar County grand jury indicted Tucker for the felony offense of injury to a disabled person.

On August 20, 2018, Tucker's appointed counsel, William Delano, moved to withdraw because Tucker "wishe[d] to represent himself without any other attorney being appointed." During the hearing on Delano's motion, Judge Lori Valenzuela questioned Tucker on his understanding of the charge against him and the risks of proceeding pro se. She specifically inquired into his age, educational level, physical condition, legal experience, and financial ability to hire an attorney. She also explained the range of possible punishment and informed Tucker if he could not afford an attorney, he had a constitutional right to have one appointed to him. Finally, she warned him she would not assist or prompt him on objections or evidentiary issues and that "there will be no special favors because you are a pro se defendant." Tucker confirmed he understood and wanted to represent himself. Judge Valenzuela found Tucker was mentally competent and had voluntarily waived his right to counsel, and Tucker signed a "Waiver of Right to Counsel." During a subsequent pretrial hearing, Visiting Judge Raymond Angelini asked Tucker, "You sure you don't want a lawyer?" and began admonishing him. Judge Angelini did not finish the admonition because Tucker stated Judge Valenzuela had already admonished him on his rights, he understood the risks, and he wanted to proceed without legal counsel.

Judge Valenzuela voluntarily recused herself in response to a motion filed by Tucker, and Bexar County Visiting Judge Mark Luitjen was assigned to preside over Tucker's trial. During a pretrial hearing, Judge Luitjen advised Tucker to consider accepting help from John Ritenour, an attorney who had agreed to serve as standby counsel. Tucker met with Ritenour and rejected his assistance. Tucker explained he had been warned about the risks of proceeding pro se and again stated he wanted to represent himself without standby counsel. He signed a second waiver of counsel on March 25, 2019.

Tucker then moved to quash the indictment based, inter alia, on an allegation "[t]hat the grand jury was illegally impaneled" because it purportedly included individuals who were "unable to offer or provide proof of Texas or Bexar County residency." The trial court denied Tucker's motion, and the parties proceeded to trial before a Bexar County jury on March 26, 2019. On March 27, 2019, the State rested and Tucker began presenting his case-in-chief. On March 27 and 28, 2019, Tucker called and questioned seven witnesses during his case-in-chief. He also filed a motion to recuse Judge Luitjen.

During a Friday, March 29, 2019 hearing on Tucker's recusal motion, Tucker told Presiding Administrative Judge Sid Harle he "would like the appointment of an attorney" to serve as standby counsel. After Judge Harle denied the recusal motion, Tucker met with attorney James Oltersdorf and refused his assistance. When the trial resumed at approximately 11:00 a.m., Tucker asked the trial court to recess for the weekend, explaining he wanted to drive to Austin to hire his own attorney and stating he could "have another attorney here by Monday." Tucker withdrew his waiver of counsel and refused to call his next witness or continue "conducting a defense without legal counsel." The trial court appointed Oltersdorf—who was present in the courtroom—as Tucker's attorney, but Tucker rejected the appointment. The trial court refused "to slow the trial down or stop the trial," noted, "We have a jury out," and told Tucker, "[Y]ou have until 1:30 if you want to go hire a lawyer, but you will be back here at 1:30 and we will proceed. . . . If you choose not to proceed, then it will be a resting of your case and then we will engage in the charge conference." Instead of hiring an attorney during the lunch break, Tucker filed a federal lawsuit against the trial court.

When the trial reconvened, Oltersdorf questioned a defense witness outside the presence of the jury.[1] After the jury returned, Tucker told the trial court, "I'm rejecting your counsel. . . . And I am not proceeding. You are not going to force me to present a defense without an attorney of my choice." At that point, the trial court declared Tucker had rested and held the charge conference, which Oltersdorf argued on Tucker's behalf. After the charge conference, Tucker stated he had not rested his case. The trial court responded it would allow Tucker to reopen the evidence, "either with Mr. Oltersdorf's help or on your own," but Tucker repeated that he wanted an attorney "of my choosing and not yours." The court then declared Tucker had "voluntarily absented himself from this court proceeding" and read the charge to the jury. Oltersdorf presented closing argument over Tucker's protestations that "Mr. Oltersdorf is not my attorney." The jury found Tucker guilty as alleged in the indictment.

During the testimony of the first witness in the punishment phase of the trial, Tucker reiterated his refusal to accept Oltersdorf as his attorney. During the second witness's testimony, however, Tucker stated, "I would like for Mr. Oltersdorf to conduct the cross-examination." Oltersdorf then conducted the examination of all but one of the remaining punishment witnesses,[2] and he gave Tucker "a little bit of a diagram to follow" during closing argument in the punishment phase. Tucker stated he "[felt] real comfortable with" using Oltersdorf's outline to present his closing argument.

After hearing the evidence, the jury assessed punishment of four years in prison, and the trial court signed a judgment consistent with the jury's verdict. This appeal followed.

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[1] Tucker's brief incorrectly states this individual was the only defense witness who testified during the guilt/innocence portion of the trial.

[2] Tucker insisted on cross-examining his ex-wife himself.

ANALYSIS

Tucker's Invocation of His Right to Counsel

Tucker argues he was denied the right to counsel because the trial court refused to recess so he could locate and hire an attorney of his choice. The State disagrees, arguing the trial court's ruling did not infringe upon Tucker's Sixth Amendment rights.

Standard of Review and Applicable Law

When a defendant moves for a continuance in order to hire counsel of his choice, we review the trial court's ruling for abuse of discretion. *See Rosales v. State*, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992); *James v. State*, 506 S.W.3d 560, 564 (Tex. App.—Houston [1st Dist.] 2016, no pet.). There is a strong presumption in favor of a defendant's right to select counsel of his choosing, and "when a trial court unreasonably or arbitrarily interferes with the defendant's right to choose counsel, its actions rise to the level of a constitutional violation." *Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex. Crim. App. 2003).

"[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988). The presumption in favor of the defendant's right to choose his own attorney "may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice." *Gonzalez*, 117 S.W.3d at 837. While an accused should be afforded a fair opportunity to secure counsel of his choice, that right is not absolute or unqualified and "must be balanced with the trial court's need for prompt, orderly, effective, and efficient administration of justice." *Brink v. State*, 78 S.W.3d 478, 483 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The "right to counsel may not be manipulated so as to obstruct the judicial process

or interfere with the administration of justice." *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000) (internal quotation marks omitted); *see also Tucker v. State*, No. 04-99-00304-CR, 2000 WL 1585611, at *5 (Tex. App.—San Antonio Oct. 25, 2000, no pet.) (mem. op., not designated for publication) (noting, in appeal of conviction of instant defendant, the Sixth Amendment's protections "cannot be manipulated in such a manner so as to throw the trial process into disarray"). A trial court has "wide latitude" in balancing these considerations. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151–52 (2006).

Application

Tucker contends his request for a weekend recess "would have caused no undue delay to the trial" because "[t]he State was allowed 3 days to present its [c]ase." The record does not support this assertion. The State began presenting its case-in-chief on March 26 and rested on March 27. Tucker called two witnesses in his case-in-chief on March 27 and five additional witnesses on March 28. He did not request a recess to hire counsel until March 29, four days into the presentation of evidence to the jury. *See Scales v. State*, No. 04-12-00435-CR, 2014 WL 667506, at *9 (Tex. App.—San Antonio Feb. 19, 2014, pet. ref'd) (mem. op., not designated for publication). Moreover, the record shows the trial had already been delayed—and the jury was forced to wait—as a result of Tucker's motion to recuse. *See id.* Additionally, although Tucker stated he could "have another attorney here by Monday," he did not identify a specific attorney he wished to hire or indicate he had taken any steps to ensure his chosen attorney would be available and ready to proceed on such short notice. *See Dixon v. State*, No. 01-12-00905-CR, 2014 WL 265854, at *6–7 (Tex. App.—Houston [1st Dist.] Jan. 23, 2014, pet. ref'd) (mem. op., not designated for publication). Nor did Tucker—who had previously declared he was indigent, was originally represented by appointed counsel, and specifically requested appointed counsel during the recusal hearing—show he could afford to hire an attorney or had found an attorney who was willing to

represent him pro bono. *See Gonzalez-Lopez*, 548 U.S. at 151 ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.").

Under these circumstances, the trial court did not abuse its discretion by concluding that delaying a jury trial at that late stage could have disrupted orderly court procedure and interfered with the administration of justice. *See King*, 29 S.W.3d at 566; *Scales*, 2014 WL 667506, at *9; *see also Ibarra v. State*, 456 S.W.3d 349, 354 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). We therefore hold the trial court's denial of Tucker's request for a recess did not unreasonably or arbitrarily interfere with his Sixth Amendment rights. *See Ibarra*, 456 S.W.3d at 354.

To the extent Tucker contends Oltersdorf's presence as standby counsel does not satisfy the Sixth Amendment's mandates, the record shows that for the majority of the punishment phase of trial, Oltersdorf functioned not as "standby" counsel, but as Tucker's actual attorney. *Cf. Funderburg v. State*, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986). Upon Tucker's explicit request, Oltersdorf questioned four of the six witnesses who testified during the punishment phase. *See id.* The actions Tucker performed with Oltersdorf as standby counsel—cross-examining his ex-wife and presenting closing argument during the punishment phase—were tasks he insisted on performing himself. Additionally, even though Oltersdorf argued the charge conference and presented closing argument in the guilt/innocence phase of the trial over Tucker's objections, the record shows Tucker specifically requested "the appointment of an attorney" when he initially withdrew his waiver of counsel. His objection to Oltersdorf's participation was not based on a renewed invocation of his right to self-representation. *See Culverhouse v. State*, 755 S.W.2d 856, 861 (Tex. Crim. App. 1988). When a defendant requires appointed counsel, the "trial court has no duty to search for counsel agreeable to the defendant." *King*, 29 S.W.3d at 566. We hold the trial court's denial of Tucker's request for a recess to hire outside counsel under these circumstances and Oltersdorf's participation in the trial did not violate Tucker's Sixth Amendment rights. *See id.*

For these reasons, we overrule Tucker's Sixth Amendment challenge to the trial court's judgment.

Tucker's Challenge to the Grand Jury

Tucker next contends the trial court should have quashed the indictment because the grand jury purportedly included "non-resident aliens who were neither residents of the State of Texas or Bexar County." The State argues Tucker waived this complaint because he did not timely challenge the grand jury's composition.

Standard of Review and Applicable Law

We review the trial court's ruling on a motion to quash an indictment de novo. *State v. Moff*, 154 S.W.3d 599, 601 (Tex. Crim. App. 2004). "Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard." TEX. CODE CRIM. PROC. ANN. art. 19.27. The Texas Court of Criminal Appeals has interpreted this provision "to mean that the array must be challenged at the first opportunity . . . which ordinarily means when the grand jury is impaneled." *Muniz v. State*, 573 S.W.2d 792, 796 (Tex. Crim. App. 1978). "If the defendant has an opportunity to challenge the array when it is impaneled and does not do so, he may not challenge it at a later date." *Id.* The court has recognized, however, that a challenge when the jury is impaneled is sometimes impossible—for example, if the offense occurs after the grand jury has already been impaneled. *Id.* In reviewing the timeliness of a grand jury challenge, the court has considered whether the defendant was represented by counsel at the time the grand jury was impaneled. *See Muniz v. State*, 672 S.W.2d 804, 808 (Tex. Crim. App. 1984).

Application

The incident that led to Tucker's indictment occurred on November 29, 2017. Because Tucker was arrested and taken into custody that day, he knew he was under investigation at that

time. The grand jury that indicted him was impaneled approximately six months later, in May of 2018. Tucker's first appointed attorney stated during the August 29, 2018 hearing on his motion to withdraw that he had represented Tucker "for approximately eight or nine months, at least." This statement indicates Tucker was represented by an attorney at the time the grand jury began its service. *Cf. id.* (finding post-impanelment challenge was timely because defendant was not represented by counsel until "after the grand jury began service"). Under these facts, it was not impossible for Tucker to challenge the array at the time of impanelment. *Muniz*, 573 S.W.2d at 796.

Based on this record, we conclude Tucker's "first opportunity" to challenge the grand jury array occurred when the grand jury was impaneled in May of 2018. However, Tucker did not file his first challenge to the array until December 26, 2018, when he objected to the racial composition of the grand jury,[3] and he did not contend that the array improperly included out-of-state residents[4] until March 26, 2019. Accordingly, he did not timely file his complaint about the grand jury array and therefore waived it. *See* TEX. CODE CRIM. PROC. art. 19.27; *Muniz*, 573 S.W.2d at 796. We overrule this challenge to the trial court's judgment.

CONCLUSION

We affirm the trial court's judgment.

Beth Watkins, Justice

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[3] Tucker's brief does not raise any complaints about the racial composition of the grand jury.
[4] Tucker's brief specifically challenges a single grand juror. We note the sealed clerk's record in this appeal shows that grand juror reported residing at a Bexar County address and working for a Bexar County employer.